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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In The Matter of	)	
ACCESS CHARGE REFORM	)	**CC Docket No. 96-262**
U S WEST, INC. PETITION FOR PARTIAL STAY PENDING JUDICIAL REVIEW	)	**CCB/CPD 97-43**

OPPOSITION OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

The Telecommunications Resellers Association ("TRA"),[1] through undersigned counsel and pursuant to Section 1.45(d) of the Commission's Rules, 47 C.F.R. § 1.45(d), and Public Notice DA 97-1811, released August 22, 1997, hereby opposes the Petition for Partial Stay Pending Judicial Review ("Petition") filed by U S West, Inc. ("U S West" or "Petitioner") in the captioned docket. In the Petition, U S West urges the Commission to stay the effectiveness of

[1] A national trade association, TRA represents more than 500 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. Although initially engaged almost exclusively in the provision of domestic interexchange telecommunications services, TRA's resale carrier members have aggressively entered new markets and are now actively reselling international, wireless, enhanced and internet services. TRA's resale carrier members are also among the many new market entrants that are or will soon be offering local exchange telecommunications services.

its Access Charge Reform Order, FCC 97-158 (released May 16, 1997),[2] as codified in Section 69-155(c) of the Commission's Rules, 47 C.F.R. § 69.155(c), to the extent that it prohibits U S West from assessing the residual transport interconnection charge ("TIC") on customers that use U S West's local switching services but do not use its local transport services.[3] In so doing, U S West seeks virtually identical relief, premised upon the same self-serving, economic protectionist arguments advanced by NYNEX in its own Petition for Partial Stay of the Commission's Access Charge Reform Order filed little more than a month ago. Like NYNEX before it, U S West fails the satisfy the exacting standards for imposition of a Stay. TRA, accordingly, urges the Commission to summarily reject U S West's Petition.

Through its Petition, U S West mirrors in all substantive respects the earlier-filed NYNEX Petition. Like NYNEX, U S West asks the Commission to reverse its policy decision supporting the advancement of local competition in order that it might be allowed to recoup additional revenues by extracting residual TIC payments from competitive providers who neither need nor desire U S West's local transport services. TRA understands the value to U S West of preserving this income stream for as long as possible, however, any benefits to U S West, like any benefits to NYNEX, would necessarily come at a high cost -- competitors would be disadvantaged in the market and consumers would be denied the benefits of price competition. This result clearly is not in keeping with the procompetitive goals of the 1996 Act[4] or the Access

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[2] Access Charge Reform ("First Report and Order"), CC Docket No. 96-262, FCC 97-158 (May 16, 1997), *pet for stay denied* FCC 97-216 (June 18, 1997), *pet. for rev. pending* Southwestern Bell Telephone Company v. FCC, Case No. 97-2620 (and consol. cases) (8th Cir. June 16, 1997) ("Access Charge Reform Order").

[3] U S West Petition at 1.

[4] Pub. L. No. 104-104, 110 Stat 56 ("1996 Act").

Charge Reform Order itself. Accordingly, TRA, for the reasons more fully set forth in TRA's Opposition to the NYNEX Petition for Partial Stay Pending Judicial Review, attached hereto and incorporated herein by reference, urges the Commission to summarily deny the Petition for Partial Stay filed by U S West in this matter.

It is well settled that a stay of a Commission action is an extraordinary form of relief which requires satisfaction of a stringent multi-pronged test.[5] In addressing requests for extraordinary relief, the Commission has long applied the four-factor test announced in Virginia Petroleum Jobbers Association v. FCC, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified in Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).[6] Thus, an applicant for stay must show that (i) it is likely to succeed on the merits on appeal; (ii) it will suffer irreparable harm in the absence of a stay; (iii) a stay would not substantially harm other interested parties; and (iv) a stay would serve the public interest.[7] U S West has satisfied none of these criteria and thus has not justify grant of a stay of the effectiveness of Section 69.155(c) of the Commission's Rules.

Relying upon the same unsupported speculations as NYNEX, U S West attempts to demonstrate the requisite irreparable harm through a potential loss of revenues and customers to competition. As the Commission has steadfastly held, "[b]are allegations of what is likely to

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[5] *See, e.g.,* Request of Radiofone, Inc. for a Stay of the C Block Broadband PCS Auction and Associated Rules, 11 FCC Rcd. 5215 (1995).

[6] *See, e.g.,* Price Cap Regulation of Local Exchange Carriers, 10 FCC Rcd. 11979, ¶ 17 (1995); Expanded Interconnection with Local Telephone Company Facilities, 8 FCC Rcd. 123, ¶ 6 (1992).

[7] *See, e.g.,* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (Order), 11 FCC Rcd. 11745, ¶ 7 (1996); Access Charge Reform ("Order"), CC Docket No. 262, FCC 97-216, ¶ 4 (released June 18, 1997).

occur are of no value since the [Commission] must decide whether the harm will in fact occur. The movant must provide . . . proof indicating that the harm is certain to occur in the future."[8] Further, the Commission has held that "economic loss does not, in and of itself, constitute irreparable harm"[9] and "revenues and customers lost to competition which can be regained through competition are not irreparable."[10] Thus, U S West's attempted assertion of "irreparable harm" is altogether without basis.

Like NYNEX, U S West erroneously asserts that a stay would not harm other parties.[11] On the contrary, maintenance of the status quo could only have the effect of forcing competitive providers to pay for a service for which they have no need, to the detriment of their ability to serve their customers in an economically efficient manner. The Commission articulated as its "overriding goal" in restructuring its access charge system the adoption of rules and policies that will "encourage efficient competitors to enter local exchange access markets so that incumbent LECs . . . [will] face substantial competition for the entire array of interstate access services."[12] If a stay is granted, consumers will be denied the benefits of increased competition and competitors will be denied the competitive opportunities Congress intended for them to have.

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8 Price Cap Performance Review for Local Exchange Carriers, 10 FCC Rcd. 11991, ¶ 14 (1995) (*citing* Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985)).

9 Order, FCC 97-216 at ¶ 30.

10 Id.

11 U S West Petition at 13.

12 Access Charge Reform ("Notice of Proposed Rulemaking"), 11 FCC Rcd. 21354, ¶ 140 (1997).

Thus, grant of the requested Stay would be particularly ill-advised inasmuch as all consumers and the public interest would suffer as a result.

The Commission has made the reasoned policy judgment that competition would be hindered by requiring competitive providers to pay the per-minute residual TIC on traffic which does not transit incumbent LEC transport facilities, thereby relieving competitive providers of the obligation to pay for some of the incumbent LEC's transport costs. That judgment is fully consistent with Commission efforts to implement access charge reform in a competitively neutral manner, consistent with its thematic approach. U S West's opposition to the implementation of the Access Charge Reform Order boils down to a simple policy disagreement with the Commission's holding. Such policy disputes are better argued on reconsideration; they do not constitute grounds for appellate reversal. In light of the benefits to competition which will flow from immediate implementation of the Access Charge Reform Order and the Commission's obvious commitment to furthering the procompetitive goals of the 1996 Act, U S West is extraordinarily unlikely to prevail on the merits, the final prong of the Stay criteria.

Because U S West has failed to satisfy any of the criteria for grant of a Stay, the Telecommunications Resellers Association, consistent with the attached Opposition to the

NYNEX Petition for Partial Stay Pending Judicial Review, urges the Commission to summarily deny the Petition for Stay Pending Judicial Review filed by U S West in the captioned docket and to permit Section 69.155(c) to remain in effect.

Respectfully submitted,

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In The Matter of	)	
ACCESS CHARGE REFORM	)	CC Docket No. 96-262
THE NYNEX TELEPHONE COMPANIES PETITION FOR PARTIAL STAY PENDING JUDICIAL REVIEW	)	CCB/CPD 97-36

OPPOSITION OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

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Washington, D.C. 20554

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ACCESS CHARGE REFORM	)	**CC Docket No. 96-262**
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THE NYNEX TELEPHONE COMPANIES PETITION FOR PARTIAL STAY PENDING JUDICIAL REVIEW	)	**CCB/CPD 97-36**

OPPOSITION OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION

The Telecommunications Resellers Association ("TRA"),[1] through undersigned counsel and pursuant to Section 1.45(d) of the Commission's Rules, 47 C.F.R. § 1.45(d), hereby opposes the Petition for Stay Pending Judicial Review ("Petition") filed by The NYNEX Telephone Companies ("NYNEX" or "Petitioner") in the captioned docket. In the Petition, NYNEX urges the Commission to stay the effectiveness of its Access Charge Reform Order, FCC 97-158 (released

[1] A national trade association, TRA represents more than 500 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. Although initially engaged almost exclusively in the provision of domestic interexchange telecommunications services, TRA's resale carrier members have aggressively entered new markets and are now actively reselling international, wireless, enhanced and internet services. TRA's resale carrier members are also among the many new market entrants that are or will soon be offering local exchange telecommunications services.

May 16, 1997),[2] as codified in Section 69-155(c) of the Commission's Rules, 47 C.F.R. § 69.155(c), to the extent that it "prohibits the local exchange carriers ("LECs") from assessing the per-minute residual transport interconnection charge ('per-minute residual TIC') on minutes of use that use a LEC's Local Switching services, but that do not use the LEC's Local Transport services."[3] NYNEX seeks the afore-referenced stay pending the outcome of an appeal it intends to file of the Access Charge Reform Order, claiming that in the absence of such action "NYNEX's customers [will] . . . begin shifting their traffic to competing services long before the per-minute residual TIC is established."[4] As TRA will demonstrate below, NYNEX has failed to satisfy the exacting standard required to warrant grant of the extraordinary relief it requests here. TRA, accordingly, urges the Commission to summarily reject the NYNEX Petition.

I.

INTRODUCTION

It is well settled that a stay of a Commission action is an extraordinary form of relief which requires satisfaction of a stringent multi-pronged test.[5] In addressing requests for extraordinary relief, the Commission has long applied the four-factor test announced in Virginia Petroleum Jobbers Association v. FCC, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified in

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2 Access Charge Reform (First Report and Order), CC Docket No. 96-262, FCC 97-158 (May 16, 1997), *pet for stay denied* FCC 97-216 (June 18, 1997), *pet. for rev. pending* Southwestern Bell Telephone Company v. FCC, Case No. 97-2620 (and consol. cases) (8th Cir. June 16, 1997).

3 NYNEX Petition at 1.

4 Id. at 2.

5 *See, e.g.*, Request of Radiofone, Inc. for a Stay of the C Block Broadband PCS Auction and Associated Rules, 11 FCC Rcd. 5215 (1995).

Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).[6] Thus, an applicant for stay must show that (i) it is likely to succeed on the merits on appeal; (ii) it will suffer irreparable harm in the absence of a stay; (iii) a stay would not substantially harm other interested parties; and (iv) a stay would serve the public interest.[7] While in some circumstances these criteria can be balanced such that a particularly strong showing under one test can compensate for a weak showing under another, a failure to make a threshold showing under any one of the criteria is generally fatal.[8] And with respect to its Access Charge Reform Order, the Commission has made clear that "the burden of showing equitable entitlement to a stay is particularly heavy because of the strong public interest in implement ['significant and much needed'] reforms."[9]

As noted above, NYNEX has not made the four-prong showing necessary to warrant grant of a stay of the effectiveness of Section 69.155(c) of the Commission's Rules. NYNEX's speculations that it will lose revenues and customers to competition do not constitute cognizable irreparable harm. The Commission has already concluded that the public interest would be well served by the introduction of "substantial competition for the entire array of interstate access

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6 *See, e.g.,* Price Cap Regulation of Local Exchange Carriers, 10 FCC Rcd. 11979, ¶ 17 (1995); Expanded Interconnection with Local Telephone Company Facilities, 8 FCC Rcd. 123, ¶ 6 (1992).

7 *See, e.g.,* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (Order), 11 FCC Rcd. 11745, ¶ 7 (1996); Access Charge Reform (Order), CC Docket No. 262, FCC 97-216, ¶ 4 (released June 18, 1997).

8 *See, e.g.,* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (Order), 11 FCC Rcd. 11745 at ¶ 23; Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, 5 FCC Rcd. 5228, ¶ 14 (1990).

9 Access Charge Reform (Order), CC Docket No. 262, FCC 97-216 at ¶ 27.

charges."[10] Competition would be diminished if competitors were compelled to pay a portion of the transport costs of incumbent LECs, denying new market entrants competitive opportunities and consumers the benefits of active price competition. And the harm of which NYNEX complains is in fact a direct result of the competitive provision of exchange access service -- an end mandated by Congress[11] and properly fostered by Commission action.

II.

ARGUMENT

A. NYNEX Has Not Demonstrated That It Will Suffer Irreparable Harm If The Requested Stay Is Not Granted

"A concrete showing of irreparable harm is an essential factor in any request for a stay."[12] The Commission has long held that "[t]o show irreparable harm, 'the injury must be both certain and great; it must be actual and not theoretical.'"[13] Moreover, the Commission has required that "the party seeking relief must show that 'the injury complained of [is] of such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm.'"[14] As the Commission has steadfastly held, "[b]are allegations of what is likely to occur are of no value since

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10 Id. at ¶ 258.

11 S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996)

12 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (Order), 11 FCC Rcd. 11745 at ¶ 8.

13 *See, e.g.*, Id.; Deferral of Licensing of MTA Commercial Broadband PCS, 11 FCC Rcd. 3214 at ¶ 29 (*citing* Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985)).

14 Price Cap Regulation of Local Exchange Carriers, 10 FCC Rcd. 11979 at ¶ 19, fn. 53 (*citing* Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985), *quoting* Ashland Oil, Inc. v. FTC, 409 F.Supp 297, 307 (D.D.C.), *afff'd* 548 F.2d 977 ((D.C. Cir. 1976)).

the [Commission] must decide whether the harm will in fact occur. The movant must provide . . . proof indicating that the harm is certain to occur in the future."[15] "[U]nsubstantiated and speculative claims," "generalized assertions," and contentions that "recoupment . .. in the future is 'simply not realistic'" have all been found by the Commission to be inadequate to support a claim of irreparable harm and the grant of a stay.[16] As the Commission has recently declared, "'[b]are allegations of what is likely to occur are of no value,' . . . because [the Commission] . . . 'must decide whether the harm will in fact occur.'"[17]

Further, as the Commission has oft declared, "'[t]he key word' in an analysis of irreparable harm is 'irreparable.'"[18] "Economic loss does not, in and of itself, constitute irreparable harm."[19] "[C]ompetitive harm is merely a type of economic loss." [20] "[R]evenues and customers lost to competition which can be regained through competition are not irreparable."[21]

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15 Price Cap Performance Review for Local Exchange Carriers, 10 FCC Rcd. 11991, ¶ 14 (1995) (*citing* Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985)).

16 *See, e.g.*, Cellularvision of New York, L.P. v. Sportschannel Associates, Petition for Stay Pending Reconsideration of Order on Program Access Complaint, 10 FCC Rcd. 13192 at ¶ 5; Price Cap Performance Review for Local Exchange Carriers, 10 FCC Rcd. 11991 at ¶¶ 14-16; Price Cap Regulation of Local Exchange Carriers, 10 FCC Rcd. 11979 at ¶¶ 18-19; Expanded Interconnection with Local Telephone Company Facilities, 8 FCC Rcd. 123 at ¶ 8; Cincinnati Bell Telephone Company, 8 FCC Rcd. 6709, ¶ 10 (1993).

17 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (Order), 11 FCC Rcd. 11745 at ¶ 8.

18 Id.

19 Access Charge Reform (Order), CC Docket No. 96-262, FCC 97-216, ¶ 30 (released June 18, 1997).

20 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (Order), 11 FCC Rcd. 11745 at ¶ 8.

21 Id.

NYNEX opines that "because the elimination of the per-minute residual TIC on CAP transport provides an irresistible incentive for the IXCs to divert their traffic to the CAPs as quickly as possible, and far in advance of January 1, 1998," it can "expect a substantial and continuing diversion of traffic to the CAPs."[22] NYNEX further "expects" that "the CAPs will seek to establish additional collocation nodes in more and more NYNEX central offices to take advantage of the residual TIC exemption."[23] NYNEX contends that the resulting harm will be irreparable because (i) "[r]eductions in revenues of this scale will not be offset by cost savings, since 90 percent of the per-minute residual TIC will be non-service related, and since the diversion of traffic will probably be concentrated on dedicated transport services, which will not save NYNEX any tandem switching costs," (ii) the Commisssion "could not order the IXCs to return their transport business to NYNEX once the IXCs have rolled-over their circuits to the CAPs," and (iii) "NYNEX would have to incur additional financial losses to provide incentives for the IXCs to shift their transport business back."[24]

NYNEX's argument "ultimately comes down to a bare claim that the company will suffer an ecomonic loss (because access revenues may be smaller) and a complaint about unwanted competition."[25] NYNEX predicates its claim that it will suffer irreparable harm on multiple layers of speculation, including "expectations" not only as to the manner in which CAPs will price their services, but with respect to the timing and nature of both CAP facilities deployment and IXC traffic allocation. NYNEX's speculations are apparently based solely on "[r]ecent inquiries from the IXCs

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22 NYNEX Petition at 20.

23 Id. at 20 - 21.

24 Id. at 22 - 23.

25 Access Charge Reform (Order), CC Docket No. 96-262, FCC 97-216 at ¶ 29.

[that] indicate that they fully appeciate and anticipate the windfall that they can receive by taking advantage of the exemption from the per-minute residual TIC on CAP transport services."[26] It is not suprising then that NYNEX's Petition, as well as the affidavits attached thereto, are filled with references to the carrier's "expectations,"[27] "probabilities,"[28] and declarations of actions CAPs and IXCs will "likely" take.[29]

Obviously, NYNEX does not know how CAPs will price their services or deploy their facilities. CAPs may not pass through the "effective price reduction" of which NYNEX complains, electing instead to set their rates at a certain percentage below NYNEX's effective rates. Likewise, CAPs may or may not elect to invest in additional nodes to exploit what may or may not be a short term pricing advantage. Given the critical need for redundancy, IXCs obviously will not divert all of their traffic and NYNEX's speculations as to the percentage of IXC traffic that will be diverted may or may not bear any resemblence to actual IXC routing decisions.

Even if NYNEX's speculations prove to have any basis in reality, the harm claimed by NYNEX falls well short of irreparable. NYNEX fears that it will lose revenues and customers to competition. Such losses are either avoidable or recoverable and hence are not irreparable. NYNEX acknowledges that it can avoid loss of customers simply by reducing its per-minute residual TIC.[30] Moreover, NYNEX concedes that the Commission could "reverse[] its rule and allow[]

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26 NYNEX Petition/Affidavit of James Kane at 4.

27 NYNEX Petition at 21, 22.

28 Id. at 22.

29 NYNEX Petition/Affidavit of James Kane at 3, 4.

30 NYNEX Petition at 20.

NYNEX to recover the per-minute residual TIC revenues retroactively," thereby remedying any resultant revenue loss.[31]

In short, NYNEX has not made the requisite concrete showing of irreparable harm, providing the necessary proof that the harm is certain, great and actual, and, to the extent the claimed injury proves to be real, the requisite demonstration that the harm is not an avoidable or recoverable loss.

B. The Balance of Equities Weighs Against NYNEX

NYNEX contends that "a stay . . . would not harm other parties," asserting that there is "no reason to assume that application of the per-minute residual TIC to CAP transport will harm competition" because "CAPs have competed very successfully with NYNEX in the Local Transport market despite the fact that the current TIC is considerably higher than the per-minute residual TIC."[32] NYNEX further contends that "a stay would be in the public interest" because it would spare IXCs and CAPs "the reconfiguration costs of shifting traffic to CAP transport on the basis of an unjustified pricing advantage that is later removed" and "avoid the substantial impact on the LECs from the loss of per-minute residual TIC and transport revenues."[33] TRA disagrees; NYNEX has failed to show "that a balance of the relevant equities favors a retention of the status quo pending further consideration or judicial review."[34]

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31 Id. at 22.

32 Id. at 23.

33 Id. at 24.

34 Access Charge Reform (Order), CC Docket No. 96-262, 97-216 at ¶ 27.

Initially, CAPs have not made significant competitive inroads into the exchange access market. As the Commission has recognized, the local exchange remains "one of the last monopoly bottleneck strongholds in telecommunications."[35] The Bell Operating Companies ("BOCs"), for example, are still "the dominant providers of local exchange and exchange access services in their in-region states, accounting for approximately 99.1 percent of the local service revenues in those markets."[36] CAPs have only "selectively impact[ed] the growth of demand of the local exchange carriers,"[37] generally serving a redundancy function for their IXC and business customers. Thus, NYNEX's assertion that CAPs have competed very successfully in the Local Transport market is a significant overstatement.

Second, the Commission has properly recognized that requiring a CAP or other competitive entrant to pay the TIC even in cases in which the CAP provides its own transport is inconsistent with the procompetitive goals of the Telecommunications Act of 1996.[38] As the Commission explained, such an approach would require "competitors of incumbent LECs [to] pay

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35 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499, ¶ 4 (1996), *motion for stay denied,* 11 FCC Rcd. 11754, *recon.* 11 FCC Rcd. 13042 (1996), *further recon.* 11 FCC Rcd. 19734 (1996), *further recon. pending, vacated in part sub nom.* Iowa Utilities Board v. FCC (and consolidated cases), Case No. 96-3321, *et al.*, (8th Cir. July 18, 1997), *partial stay granted* 109 F.3d 1418 (1996), *stay lifted in part* (Nov. 1, 1996), *motion to vacate stay denied* 117 S.Ct. 429 (1996).

36 Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, FCC 96-489, ¶ 10 (released Dec. 24, 1997), *pet. for rev. pending sub nom.* Bell Atlantic Tel. Cos. v. FCC, Case No. 97-1067 (D.C. Cir. Jan. 31, 1997), *recon. pending.*

37 Fiber Deployment Update: End of Year 1995, Kraushaar, J. M., Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, 34 (July 1996).

38 Access Charge Reform (First Report and Order), CC Docket No. 96-262, FCC 97-158 at ¶ 240.

some of the incumbent LEC's transport costs."[39] Requiring new market entrants to so subsidize entrenched monopoly providers is antithetical to the Congressional directive to open the local exchange/exchange access market to competition.

As the Commission has noted, [c]ompetition in local exchange and exchange access markets is desirable . . . [both] because of the social and economic benefits competition will bring to consumers of local service . . . [and] because competition will eventually eliminate the ability of an incumbent local exchange carrier to use its control of bottleneck local facilities to impede free market competition."[40] Indeed, the Commission articulated as its "overriding goal" in restructuring its access charge system the adoption of rules and policies that will "encourage efficient competitors to enter local exchange access markets so that incumbent LECs . . . [will] face substantial competition for the entire array of interstate access services."[41] Accordingly, a party seeking a stay of a Rule designed to facilitate exchange access competition bears a particularly heavy burden. And as noted above, the Commission has made clear that for a stay request involving "significant and much needed reforms of access charge and price caps regulation," the "burden of showing equitable entitlement to a stay is particularly heavy because of the strong public interest in implementing these reforms."[42]

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39 Id.

40 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499 at ¶ 4.

41 Access Charge Reform (Notice of Proposed Rulemaking), 11 FCC Rcd. 21354, ¶ 140 (1997).

42 Access Charge Reform (Order), CC Docket No. 96-262, FCC 97-216 at ¶ 27.

NYNEX has acknowledged that avoidance of price competition is one of the overriding reasons for which it seeks a stay here. Thus NYNEX complains that it "will not have a reasonable opportunity to compete for . . . [transport] traffic unless it reduces the per-minute residual TIC rates to zero."[43] Moreover, NYNEX decries the need to "incur additional financial losses to provide incentives for the IXCs to shift their transport business back."[44]

NYNEX's claims to the contrary notwithstanding, if a stay is granted, consumers will be denied the benefits of increased competition and competitors will be denied competitive opportunities the Congress intended for them to have. To paraphrase the Commission, a stay "would avoid the immediate benefit to ratepayers that the Commission sought to provide in its order[]" and "would needlessly and seriously delay the development of local competition -- in direct contravention of the goals Congress sought to achieve in the 1996 Telecommunications Act."[45]

C. NYNEX Has Not Shown A Substantial Likelihood That It Will Prevail On The Merits

NYNEX opines that the Commission's decision to permit incumbent LECs to assess per-minute residual TIC charges only on traffic that transits incumbent LEC transport facilities, and not on traffic carried by a CAP whose facilities interconnect with an incumbent LEC's switched access network at the end office is both substantively and procedurally defective. NYNEX argues that in declining to permit it to levy per-minute residual TIC charges on minutes that transit a CAP's transport network without using any incumbent LEC transport facilities, the Commission acted

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43 NYNEX Petition at 20.

44 Id. at 23.

45 Access Charge Reform (Order), CC Docket No. 96-262, FCC 97-216 at 38.

arbitrarily, discriminated against incumbent LECs and undermined competition.[46] Moreover, NYNEX asserts that the Commission erred in not providing it with adequate notice and opportunity to comment on this action."[47]

"Because of the clear failure of . . . [NYNEX] to meet the irreparable harm, harm to others, and public interest requirements for obtaining a stay," only a cursory response to NYNEX's substantive rationale for the stay is required.[48] Moreover, NYNEX's objections essentially reflect a fundamental policy disagreement with the Commission's holding. Such policy disputes are better argued on reconsideration; they do not constitute grounds for appellate reversal.

The Commission has made the reasoned policy judgment that competition would be hindered by requiring CAPs to pay the per-minute residual TIC on traffic which does not transit incumbent LEC transport facilities, thereby relieving CAPs of the obligation to pay for some of the incumbent LEC's transport costs. That judgment is fully consistent with Commission efforts to implement access charge reform in a competitively neutral manner, consistent with its thematic approach to implementation of the telephony provisions of the 1996 Telecommunications Act. The "inconsistencies" NYNEX identifies are occasioned by the evolutionary nature of the Commission's access charge reforms. While the Commission sought to "migrate the current usage-based charges into flat-rated charges as quickly as possible," it recognized the need to "avoid[] short-term market

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46 NYNEX Petition at 10 - 18.

47 Id. at 18 - 20.

48 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (Order), 11 FCC Rcd. 11745 at ¶ 23.

distortions."[49] The resultant phased migration mitigated such market distortions, but created certain competitive anomalies, one of which the Commission addressed by prohibiting incumbent LECs from imposing the residual per-minute TIC on CAP traffic which did not transit incumbent LEC transport facilities. That action is rationally-based and well reasoned.

NYNEX's suggestion that if was not afforded notice of, and an opportunity to comment on, the Commission action of which it complains here can be readily dismissed. In its Notice of Proposed Rulemaking, the Commission advised that it would be taking a "comprehensive review of our interstate access charge regime."[50] Moreover, the Commission indicated that it intended to restructure transport charges and to phase out the TIC, dedicating nearly 50 paragraphs of discussion to a host of potential alternative approaches. The actions taken by the Commission were thus a logical outgrowth of the issues presented in the Notice of Proposed Rulemaking; nothing more is required.[51]

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49 Access Charge Reform (Order), CC Docket No. 96-262, FCC 97-216 at ¶ 234.

50 Access Charge Reform (Notice of Proposed Rulemaking), 11 FCC Rcd. 21354 at ¶ 13 (1997).

51 Implementation of the Cable Television Consumer Protection and Competition Act of 1992 (Memorandum Opinion and Order), 9 FCC Rcd. 6723, ¶ 32 (1994).

III.

CONCLUSION

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to summarily deny the Petition for Stay Pending Judicial Review filed by the NYNEX Telephone Companies in the captioned docket and to permit Section 69.155(c) to remain in effect.

Respectfully submitted,

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